

DRAINAGE EASEMENTS AND AGREEMENTS

The Nature of Easements

An easement is the right to use the land of one person for a specific purpose to benefit another's interests. Traditionally the term "easement" is applied to two adjoining property owners. An easement holder has the right to use his neighbor's property in some prescribed manner to benefit his own adjoining land. An obvious example is an access easement which allows a landowner to use a specific part of a neighbor's land for access to his property. That easement is a benefit to the easement holder's property. But the easement is also a burden to the neighbor's property. Technically, the easement belongs to the dominant estate, rather than the person who actually owns that land. (Historically, the easement holder's land was termed the "dominant estate" and the neighbor's land was the "servient estate.") Similarly, the easement burdens the servient estate, rather than the neighbor who holds title.

The benefit possessed by the easement holder does not include the right to use the easement land to make a profit or to deny access to the landowner. For example, an access easement across a farm field would not allow the easement holder to raise crops on the easement area. Nor would it prevent the owner of the servient estate from growing crops in the easement area so long as that use didn't hinder the purpose of the easement. (If a person has the exclusive right to use another person's property to grow crops, that right is generally termed a "tenancy," not an easement. Tenancies are temporary and are valid only for a defined period of time, usually involving the payment of rent.) Most easements are permanent or for as long as needed and do not include lease payments.

As government and quasi-government (such as utilities) use of private land has become much more common, the nature of easements has changed. The beneficiary of an easement today is often not a neighbor. An easement may benefit the general public, such as for installation of high voltage electrical lines,

or it may benefit all of the land in a governmental entity, such as the drainage easement created as part of a drainage district. Because of these modern uses, the terms "servient estate" and "dominant estate" may no longer adequately describe the rights and duties created by easements.

Easements are sought and granted for many purposes, such as the use of a strip of land for a driveway, railroad right-of-way, discharging smoke and soot onto the premises of another, underground pipes, utility lines, sewers, water mains, and roads.

Easements can be created in three ways: by express written grant, by implication, or by prescription.

Express Grant

An express grant is similar to a deed and must be in writing. The document should contain a precise description of the boundaries covered by the easement. In addition, the purpose or use of the easement should be specified and the persons who own the dominant estate and servient estate must be identified. And of course, it must be signed.¹

For example, consider an 80-acre field with a lane on one side providing access from a public road to the rear half of the property. The owner decides to sell the front half but wants to keep using the lane for access to the remaining back part. In the deed conveying the front parcel, the seller would include a clause allowing continued use of the lane to access the remaining part. The location and dimensions of the lane would be described in this clause. This verbiage in the deed reserving the access easement is an express grant.

Implied Easement

Now consider the same example except that a clause reserving the easement isn't included in the deed. After the sale, the seller asks the buyer to agree that the seller has an easement for use of the lane, but the buyer won't agree. The seller can ask the district court to declare that an easement must have been intended because the remaining portion of the property

has no other access to a public road. If a judge agrees, finding that the seller used the lane previous to the sale and that the access must continue in order for the back half to be useable, the decision creates an easement by implication.²

Prescriptive Easement

An easement by prescription is sometimes described as adverse possession. The existence of an easement can be declared by a court if the evidence shows (1) that use has continued for at least 10 years; (2) the user has expressly informed the owner of the servient estate that it is believed that a legal right to the easement exists; and (3) the owner of the servient estate has disagreed that the dominant estate has such an easement.³

Prescriptive rights cannot be claimed against public property.

Private Drainage Easements, Natural and Legal

A land owner has the right to drain accumulated rainfall naturally from that estate over adjoining neighboring property. Neighbors have the duty to accept that natural drainage flow. In that regard, upstream owners have the right to use downstream property for benefit. The benefit received is in having water drain off higher elevation land, allowing more beneficial use of that property. A downstream neighbor cannot adversely affect that benefit by blocking drainage, even if receiving the runoff water damages property or limits its usefulness.

Rights of upstream owners and duties of downstream owners are what make up a natural drainage easement.⁴ The higher elevation property is the “dominant estate” and neighboring downstream property is the “servient estate.” In like manner, the downstream neighbor has the right to drain that property naturally across further adjoining lands. This chain of private natural easements continues until the

drainage water reaches a lake or river that is acknowledged as owned by the public.

Drainage must flow off property in a natural watercourse.⁵ But that watercourse does not have to look like a creek and it does not require a channel with well defined banks.⁶ A slight swale can represent a natural watercourse.⁷ The sheet flow of runoff drainage across land might be a natural watercourse if occurring uniformly or routinely as a result of normal rains.⁸ A watercourse must be at least partially natural, rather than entirely manmade. Excavating a ditch where a slight swale exists to partially divert and concentrate the natural flow of surface water which subsequently becomes a living, flowing stream of water can be a natural watercourse over time.⁹

There are limits and conditions on property rights and duties regarding drainage accommodations. A property owner cannot dam or divert the flow of water if doing so causes harm to either upstream or downstream lands.¹⁰ The existence of a natural drainage easement across neighboring land does not allow upstream owners to increase the volume of water cast off or to increase the velocity of flow if that increase causes significant damage to adjacent properties.¹¹

For many years, the Iowa legal system did not describe this inherent natural easement. The law simply recognized that a property owner had the right for a waterway to flow in the accustomed course across neighboring lands.¹² However, in the last half of the 20th century, Iowa courts recognized these rights and duties as “legal and natural easements.”¹³ In 1990, the Iowa Supreme Court refined the basic rules of natural easement in more modern terminology, ruling that the dominant owner is entitled to drain surface water in a natural watercourse from his land over the servient owner’s land and, if any damage results, the servient owner must bear the damage. However, both the dominant and servient owners must exercise ordinary care in the use of their property so as not to injure the rights of neighboring land owners by block-

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ing, diverting or substantially increasing or decreasing the flow of water.¹⁴

Drainage easements can also be created or ended by the actions of agencies, private companies, or persons. A written drainage easement (easement by express grant) can be created specifically addressing the right to enter onto lands of others to install improvements or for repair and maintenance. This is the optimal manner of establishing easement rights. Such easement documents generally include the following information:

- a detailed description of the lands involved, including the area to be drained
- names of all owners and/or tenants with an interest in the lands
- description of the drainage feature addressed: tile, ditch, etc.
- explanation of the rights conveyed by the easement: to enter for initial installation and later repair or maintenance purposes, etc.
- methods of installation
- rights of owners to use the drainage facilities for their own purposes
- any cost assessments
- statement that the easement must be recorded and is permanently assigned to the land in question

These written easements primarily affect the owners' use of the land only during times of initial installation and subsequent maintenance and repairs.

Public Drainage Easements, Natural and Legal

A natural easement exists in every natural water course for the benefit of all land which normally drains into it.¹⁵ The land through which such an easement runs is burdened by that easement and all land owners along the water course must observe the rights that others have in the easement.¹⁶ Artificial channels may

also be considered water courses which create an easement. This easement exists either because of the concerted action between historic owners of the lands through which a created ditch runs or simply by prescription.¹⁷

Public agencies could reduce land acquisition costs for drainage improvements if appraisers and design engineers considered the existence of these natural drainage easements. In most cases, Iowa law requires that the value of the property to be acquired must be estimated by an appraiser and that value used in negotiation or condemnation.¹⁸ However, an appraiser might not take into account the existence of natural or prescriptive easements since they may not be filed with a county recorder or established by court order. Likewise a design engineer may describe a larger parcel of land than is necessary to acquire. In addition, final determination of the extent and scope of natural or prescriptive public easements may require the filing of declaratory judgments prior to or during the land acquisition process.¹⁹ Since land acquisition costs are often the most expensive part of a drainage improvement, public agencies should consider the existence of natural or prescriptive easements early in the planning process.

Easements Acquired by Drainage Districts

The construction of drainage district facilities requires the acquisition of right-of-way for open ditches, underground tile, and other improvements.²⁰ A drainage district acquires either permanent easement or fee simple title for all right-of-way needed for these improvements.²¹ One of the first steps in establishing a drainage district is to prepare a report describing the location and survey of ditches, drains, and other necessary improvements.²² After the district is established, the survey and report of the engineer, or the permanent survey, plat, and profile, if made, describe

the scope and dimensions of the drainage easements. These documents are filed with the county auditor. When filed, they constitute constructive notice of the existence of the drainage district easements.²³

Frequently, old drainage district records have been lost or did not identify the location and dimensions of the easements. When that occurs, the board of supervisors or board of trustees may survey the drainage improvements and define the right-of-way of the drainage easements. After completing a hearing process, the new description of the improvements constitutes a permanent easement in favor of the drainage district for drainage purposes.²⁴

Additionally, drainage district easements may be created by prescription. If a property owner knew or should have known that a drainage district improvement was located on the owner's land, that owner has a duty to discover the existence of the drainage records and determine the extent of the easement.²⁵ Without regard to the existence of drainage district records in the auditor's office, a drainage district may acquire a prescriptive easement at the location of ditches, tiles, or other drainage improvements. When the owner of the property has consented to the construction of the drainage improvements and the district has expended funds as consideration for an agreement to construct the improvements, a prescriptive easement is established simply by the existence of the drainage improvement for more than ten years. In such case, it is not necessary to show that the district had made a claim of ownership or that the claim was not agreed to by the property owner.²⁶

Agreements

Agreements are another form of documentation that protect the legal rights of all concerned. Agreements are especially important when two or more owners are involved because pertinent rights and obligations are enumerated and thus misunderstandings are mini-

mized. Agreements, like easements should be signed before a notary public and properly recorded.

Caveat

This summary of drainage easements provides a general overview only; specific cases and individual situations may lead to different results than suggested here. The summary is believed to be correct, but should not be applied to specific situations without additional research and/or legal advice.

Additional Case Law

Additional information can be found in the following court decisions:

Definitions

Dawson v. McKinnon, 226 Iowa 756, 285 N. W. 258, 263 (Iowa 1939)

Hawk v. Rice, 325 N. W.2d 622

Types of Easements

Kahl v. Clear Lake Methodist Camp Association, 265 N. W.2d 622, 624 (Iowa 1978)

Wiegmann v. Baier, 203 N. W.2d 204 (Iowa 1972)

Riverton Farms, Inc. v. Castle, 441 N. W.2d 405 (Iowa 1989)

Murrane v. Clarke County, 440 N. W.2d 613 (Iowa 1985)

Anderson v. Yearous, 249 N. W.2d 855 (Iowa 1977)

National Properties v. Polk County, 352 N. W.2d 509 (Iowa 1984)

Allamakee County v. Collins Trust, 599 N. W.2d 448

Tamm, Inc. v. Pildis, 249 N. W.2d 823 (Iowa 1976)

Schwab v. Green, 215 N. W.2d 140 (Iowa 1974)

Kline v. Richardson, 526 N. W.2d 166 (Iowa App.1994)

Webb v. Arterburn, 246 Iowa 363, 379 67 N. W.2d 504, 513 (Iowa 1954)

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Extent of Easement

Hagenson v. United Telephone Company of Iowa, 209 N. W.2d 76 (Iowa 1973)

Gilmore v. New Beck Levee District Harrison County, 212 N. W.2d 477 (Iowa 1973)

Notes

1. Iowa Code §§ 558.1, 558.41, 558.49-.60, 564.1 et. seq., 622.32.

2. *Schwob v. Green*, 215 N.W.2d 240 (Iowa 1974); *Loughman v. Couchamn*, 242 Iowa 885, 47 N.W.2d 152 (1951); *Rank v. Frame*, 522 N.W.2d 848 (Iowa App. 1994).

3. Iowa Code § 564.1 et. seq.

4. An easement is an interest in land which entitles the owner of the easement to use or enjoy land which is in the possession of another. Restatement of Property, §450 et. seq. (1944); An easement is an interest in land which is a privilege without profit which the owner of one neighboring tenement has of another tenement, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner. *Churchill vs. Burlington Water Company*, 94 Iowa 89, 93, 93 N.W. 646, 647 (1895).

5. *Hinkle vs. Avery*, 86 Iowa 241, 55 N.W. 77 (1893).

6. *Hull vs. Harker*, 130 Iowa 190, 106 N.W. 629 (1906).

7. *Parisek vs. Hinek*, 144 Iowa 568, 123 N.W. 180 (1909).

8. *Hull vs. Harker*, 130 Iowa 190, 106 N.W. 629 (1906).

9. *Falcon vs. Boyer*, 157 Iowa 745, 142 N.W. 427 (1913).

10. *Moffett vs. Brewer*, 1 Greene 348 (Iowa 1848).

When Iowa was settled in the mid 19th century, the flow of water in streams and rivers provided power to run mills that made everything from flour to clothing.

The right to receive a natural flow of water was as important as the right to cast off surface water. Many early Iowa court cases determined the right of mill owners to receive a natural flow of water and the amount of damages they would be entitled to if their upstream neighbor stopped the flow of water.

11. *Rosendahl v. Iowa State Highway Comm.*, 171 N.W.2d 530 (Iowa 1969).

12. *Moffett vs. Brewer*, 1 Greene 348 (Iowa 1848).

13. *Witthauer v. City of Council Bluffs*, 257 Iowa 493, 133 N.W.2d 71 (1965).

14. *O'Toole v. Hathaway*, 461 N.W.2d 161 (Iowa 1990).

15. *Chicago N. W.Ry .Co.v. Drainage District #5*, 142 Iowa 607, 121 N.W. 193 (Iowa 1909); *Maben v. Olson*, 187 Iowa 1060, 175 N.W. 512 (Iowa 1919).

16. *Maben v. Olson*, 175 N.W., at 513; *Hayes v. Dyer*, 164 Iowa 697, 146 N.W. 857 (Iowa 1914).

17. *Nixon v. Welch*, 238 Iowa 34, 24 N.W.2d 476 (Iowa 1946).

18. Iowa Code § 6B.45.

19. *Hervan v. Drew*, 216 Iowa 315, 249 N.W. 277, 278 (1933); *Hunt v. Smith*, 238 Iowa 543, 28 N.W.2d 213 (1947).

20. Section 468.3(5), 468.11, 468.12.

21. Iowa Code § 468.27.

22. Iowa Code § 468.11.

23. Iowa Code § 468.27.

24. Iowa Code § 468.126(8).

25. *National Properties Corporation v. Polk County*, 351 N.W.2d 509 (Iowa 1984); *National Properties Corporation v. Polk County [National Properties II]*, 386 N.W.2d 98 (Iowa 1986).

26. *National Properties II*, 386 N.W.2d, at 105, and citations therein. § 468.27.